Malaysian Tobacco Co Bhd v The Roadrailer Service Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-12-93
MOKHTAR SIDIN J
23 SEPTEMBER 1994

Contract *— Indemnity — Indemnity against theft in haulage contract — Non-delivery of goods due to robbery — Whether robbery is theft within context of indemnity clause*

Words and Phrases *— 'Theft' — Whether includes robbery*

By an agreement dated 31 July 1982, the defendant undertook for reward to carry goods of the plaintiff and to deliver them to designated consignees of the plaintiff. Clause 15.1 of the agreement stated that the hired haulier would be fully responsible for the safe receipt and delivery of the goods and that they would indemnify the plaintiff in full 'for all losses, shortages/damaged goods, arising from whatever cause including misdelivery and mishandling by persons within the hired haulier's control, theft, burglary, pilferage, fraud, dishonesty and criminal breach of trust'. The plaintiff failed to deliver certain goods to the value of RM359,558.34 to the northern region of Malaysia since the carrier was robbed of its goods by person or persons unknown. The plaintiff claimed against the defendant the said sum. The defendant contended that the clause was not applicable as the robbery was not a theft within the meaning of cl 15.1 and that even if it was theft within the meaning of cl 15.1, the defendant was not liable because the theft was not done by person or persons within the control of the defendant as stipulated by cl 15.1.

Held, allowing the plaintiff's claim:

(1) Since robbery is an aggravated form of theft, robbery is theft within the meaning of cl 15.1 which was an indemnity clause. The omission of the word 'robbery' from the clause would not constitute an exception.

(2) The words 'by persons within the hired haulier's control' were only applicable to wrongdoings stated in the first part of the clause, ie 'for all losses, shortages/damaged goods arising from whatever cause including misdelivery and mishandling'. It did not apply to wrongdoings or misdeeds in the second part of the clause which were 'theft, burglary, pilferage, fraud, dishonesty and criminal breach of trust'. In the case of theft, it was theft in the normal circumstances committed by anybody and not confined to theft by persons within the hired haulier's control. Therefore, there was no merit in the defence of the defendant.

[Bahasa Malaysia summary

Melalui suatu perjanjian bertarikh 31 Julai 1982, defendan telah berjanji untuk ganjaran untuk mengangkut barangan plaintif dan menghantarkannya kepada penerima-penerima konsain plaintif. Fasal 15.1 perjanjian itu menyatakan bahawa syarikat pengangkutan upahan itu adalah bertanggungjawab sepenuhnya untuk penerimaan dan penyerahan selamat barangan itu dan mereka akan menanggung rugi plaintif sepenuhnya 'untuk segala kehilangan, kekurangan/barangan rosak, yang timbul daripada apa sahaja sebab termasuk penyalahserahan dan pengendalian salah oleh sesiapa yang berada di bawah kawalan syarikat pengangkutan upahan, pencurian (theft), mencuri (burglary), kejadian mencuri (pilferage), fraud, ketidakjujuran dan pecah amanah jenayah'. Plaintif telah gagal menghantar barangan tertentu yang bernilai RM359,558.34 ke kawasan utara Malaysia kerana pengangkut itu telah dirompak barangannya oleh seorang atau orang-orang yang tidak dikenali. Plaintif menuntut jumlah tersebut daripada defendan. Defendan menegaskan bahawa fasal itu tidak terpakai kerana rompakan itu bukan satu pencurian dalam ertikata fasal 15 dan walaupun ianya adalah suatu pencurian dalam ertikata fasal 15, defendan tidak bertanggungjawab kerana pencurian itu tidak dilakukan oleh seorang atau orang-orang dalam kawalan defendan sebagaimana yang disyaratkan oleh fasal 15.

Diputuskan, membenarkan tuntutan plaintif:

(1) Memandangkan rompakan adalah satu bentuk pencurian yang teruk, rompakan adalah pencurian dalam ertikata fasal 15.1 yang merupakan suatu fasal tanggung rugi. Peninggalan perkataan 'rompakan' tidak akan bermakna suatu kekecualian.

(2) Perkataan-perkataan 'oleh sesiapa yang berada di bawah kawalan syarikat pengangkutan upahan' hanya terpakai kepada kesalahan-kesalahan yang dinyatakan dalam bahagian pertama fasal itu, iaitu 'untuk segala kehilangan, kekurangan/barangan rosak yang timbul daripada apa sahaja sebab termasuk penyalahserahan dan pengendalian salah'. Ia tidak terpakai kepada kesalahan atau perbuatan salah dalam bahagian kedua fasal tersebut iaitu 'pencurian (theft), mencuri (burglary), kejadian mencuri (pilferage), fraud, ketidakjujuran dan pecah amanah jenayah'. Dalam kes pencurian, ia adalah pencurian dalam keadaan biasa yang dilakukan oleh sesiapa dan tidak terhad kepada pencurian oleh orang di bawah kawalan syarikat pengangkutan upahan itu. Oleh itu, tidak ada merit dalam pembelaan defendan.]

Notes

For cases on indemnity, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1814–1816.

For cases on the construction of the word 'theft', see *Malayan Law Journal Words and Phrases Judicially Defined* [1990] at pp 566–567.

Case referred to

Wong Kon Poh v New India Assurance Co Ltd [1970] 2 MLJ 287 (folld)

Saidah Rastam (*Skrine & Co*) for the plaintiff.
KY Leong (*S Sothi, Leong & Partners*) for the defendant.

Cur Adv Vult

Mokhtar Sidin J: In this case, both parties had agreed to the facts and no evidence had been adduced during the trial. By an agreement dated 31 July 1982 between the plaintiff and the defendant, the defendant undertook for reward to carry certain goods of the plaintiff and to deliver them to designated consignees of the plaintiff. On or about 30 May 1983, the plaintiff delivered and the defendant received and accepted in Kuala Lumpur goods, the property of the plaintiff, to the value of RM359,558.34 based on the invoice price to be safely and securely carried to the northern region of Malaysia. The defendant as carrier of the said goods failed to deliver the said goods since somewhere near Templer's Park, the carrier was robbed of its goods by person or persons unknown. The plaintiff now claims against the defendant the said sum.

Both parties agreed that the question before the court is whether under cl 15 of the agreement, the defendant is liable to make good the losses suffered by the plaintiff. Clause 15 of the said agreement reads as follows:

> Indemnity
>
> 15.1 The hired haulier shall be fully responsible for the safe receipt and delivery of the goods. The hired haulier undertakes to indemnify the company in full for all losses, shortages/damaged goods, arising from whatever cause including misdelivery and mishandling by persons within the hired haulier's control, theft, burglary, pilferage, fraud, dishonesty and criminal breach of trust.
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> 15.2 The words 'whatever cause' mentioned in cl 15.1 above specifically exclude loss/damage arising from the following:
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> a) Act of God, monsoon, tempest, lightning, torrential rain, floods, typhoons, explosion, temperate changes, earthquake, fire and any other cause beyond the control of the hired haulier.
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> b) Enemy action, hostilities, intervention of government authorities or agencies.
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> c) Riot and strike, lockouts, sabotage and vandalism.
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> 15.3 In the event of theft, burglary, fraud, criminal breach of trust and any other criminal acts, the hired haulier shall report the matter to the police and notify the company after its discovery.

It was contended by the defendant that the clause is not applicable to the defendant. It was submitted by the defendant that the incident of robbery at Templer's Park is not a theft within the meaning of cl 15.1. Secondly,

it was submitted by the defendant that even if it is theft within the meaning of cl 15.1, the defendant is not liable because the theft was not done by person or persons within the control of the defendant as stipulated by cl 15.1.

Counsel for the defendant went to great length to convince the court that the robbery incident was not theft within the meaning of cl 15.1. He stated that the theft in cl 15.1 did not include robbery. This point had been decided in the case of *Wong Kon Poh v New India Assurance Co Ltd* [1970] 2 MLJ 287 which is a Federal Court decision. It was held in that case that theft being an essential element of robbery, robbery is still theft, although an aggravated form. Ong CJ (as he then was) at pp 288–289 stated as follows:

> At all events, to deny the axiomatic truth of the proposition that 'robbery is an aggravated form of theft' and to dismiss the appeal on that ground is manifestly a denial of justice upon a technical defence which has absolutely no merits. A policy which insures against loss by 'burglary, housebreaking or theft', but says nothing of 'robbery', must on any reasonable construction be held to include 'robbery' within the coverage of 'theft'. Like burglary or housebreaking, robbery is merely a variation of the same theme. Otherwise its exception must clearly and expressly be made known to the party insured — not by implication to be inferred from the omission. To require that the ordinary man taking out a policy should read into it not only what was expressed, but also to construe omissions as exceptions, is an absurd proposition which this court cannot countenance.

It is clear to me what his Lordship has stated, that the omission of the word 'robbery' from the clause will not constitute an exception. Since robbery is an aggravated form of theft, robbery is theft within the meaning of that clause. The clause in which the word 'theft' is stated but not the word 'robbery' was an indemnity clause in the insurance policy and in the present case is also an indemnity clause. As such, I am of the view that what had been stated by his Lordship is applicable here and as such I will hold that the word 'theft' includes 'robbery'. In my view, to conclude otherwise would be ridiculous as stated by his Lordship at p 288:

> ... Indeed we are not aware of any insurers hitherto repudiating liability simply on the ground that 'robbery' is not a risk covered by insurance against 'theft'. As Ali FJ pointed out, where a thief attempted to sneak off on the appellant's motorcycle and managed to do so, it was of course a case of theft, which was covered by the policy; but, if the thief, while interrupted in the act, drew a dagger and warned the appellant not to prevent his getaway, how in the name of commonsense can it be argued that the taking, in the latter case, was not as much a risk insured against as the taking by stealth?

It was contended by the defendant that even though 'robbery' was 'theft' within the meaning of cl 15.1, the indemnity was not applicable because the 'robbery' was not done by persons within the hired haulier's control. It was submitted by the defendant that words 'by persons within the hired haulier's control' in cl 15.1 also applied to the word 'theft'. In my view, the interpretation submitted by the defendant is absurd. It is clear to me that

A the words 'by persons within the hired haulier's control' were only applicable to wrongdoings stated in the first part of the clause, ie 'for all losses, shortages/damaged goods, arising from whatever cause including misdelivery and mishandling'. It did not apply to wrongdoings or misdeeds to the second part of the clause which were 'theft, burglary, pilferage, fraud, dishonesty and criminal breach of trust'. It is obvious to me that in the case B of 'theft, burglary and pilferage', this was done by persons unknown to the parties at the time of the commission of the offence and in some cases not known forever.

On reading cl 15.1, it is obvious to me that in the case of theft it was theft in the normal circumstances which is committed by anybody and not C confined to theft 'by persons within the hired haulier's control'.

In view of the above, I find that there is no merit in the defence of the defendant. The plaintiff is entitled to succeed in the claim. Judgment and costs to the plaintiff.

D *Claim allowed.*

Reported by Sarojah Arianayagam

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